IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 30, 2006 Session

PATRICK J. McREDMOND, JR., ET AL. v. ESTATE OF ANDREW MARIANELLI, ET AL.

Appeal from the Chancery Court for Davidson County
No. 93-2368-I(III) Ellen Hobbs Lyle, Chancellor

No. M2004-01496-COA-R3-CV - Filed on September 29, 2006

This is the third appeal of this shareholder derivative suit. Plaintiffs, minority stockholders in Elk Brand Manufacturing Company (Elk), a Kentucky corporation engaged in the apparel manufacturing business, brought suit in the name of the corporation against individual directors of the corporation. Plaintiffs allege the individual directors breached their fiduciary duties to the corporation by entering into an agreement that transferred revenue that could have been earned by Elk to another entity in which the defendant directors had an interest. After a trial by jury, judgment was rendered against one of the individual directors, Walter Marianelli, in the amount of $6,918,252.00, and another, David Manning, in the amount of $23,138.00. Plaintiff's attorneys were awarded attorneys' fees against Elk pursuant to the Kentucky common fund doctrine. The individual directors and Elk have appealed, alleging error in the jury instructions given by the trial court, the admission of certain evidence, improper argument of counsel, the trial court's approval of the verdict and the award of attorneys' fees. Finding no reversible error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

DONALD P. HARRIS, SR.J., delivered the opinion of the court, in which ALAN E. HIGHERS and HOLLY M. KIRBY, JJ, joined.

Cyrus Booker, Tara A. Gillespie, Nashville, Tennessee, for Appellants, Estate of Andrew Marianelli, Walter Marianelli, David Manning, and Edwin Pyle.

Jon D. Ross, Elizabeth S. Tipping, Nashville, Tennessee, for Appellant, Elk Brand Manufacturing Company.

G. Thomas Nebel, Suzette Peyton, Brentwood, Tennessee, for Appellees, Patrick J. McRedmond, Jr., and Monica McRedmond Terry, on behalf of Elk Brand Manufacturing Company.

William L. Harbison, L. Webb Campbell, Nashville, Tennessee, for Appellee, Sherrard & Roe, PLC

OPINION

I. THE PARTIES

Elk Brand Manufacturing (Elk) is a Kentucky corporation engaged in garment manufacturing. Patrick McRedmond, Jr. and Monica McRedmond Terry (Derivative Plaintiffs) own 154 and 158 shares of Elk stock, respectively. The McRedmond family members owned an additional 400 shares, collectively. The Derivative Plaintiffs' uncle, Louis McRedmond, formerly a plaintiff in this case, is now deceased.[1] The father of the Derivative Plaintiffs is Patrick McRedmond, Sr., the owner of 54 shares of Elk, who served on the Board of Directors of Elk from the mid-1960s until March 1994.

Defendant Andrew Marianelli acquired an interest in Elk in the mid-1960s, and was the majority shareholder of Elk prior to Elk's entry into the Marketing Service Agreement (MSA) with the Milano Corporation (Milano). See *infra*. Andrew Marianelli served on the Elk Board of Directors from the mid-1960s until October 1997. Andrew Marianelli died during the course of this litigation, and his Estate was substituted as a party to this action. Defendant Walter Marianelli is the son of Andrew Marianelli. Walter Marianelli has served on the Elk Board of Directors from July 1988 to the present. In addition, Walter Marianelli is the majority shareholder of Milano.

Defendant David Manning served as Comptroller of Elk and was an initial shareholder of Milano. Mr. Manning was elected as an Elk Director in February 1991 and served as Director until March 1997. Mr. Manning never owned Elk stock. Mr. Manning left Elk and Milano in 1997 to take another job. Defendant, Edwin S. Pyle (together with Messrs. Walter Marianelli, David Manning, and the Estate of Andrew Marianelli, the "Individual Defendants"), has served as a Director of Elk from July 1988 until the present. He has also served as the Corporate Secretary of Elk since February 17, 1990. Mr. Pyle is not a shareholder of Elk or Milano and has never served on the Elk Board of Directors.

II. FACTUAL BACKGROUND

A full recitation of the background facts is contained in this Court's opinion in *McRedmond, et al. v. Estate of Mirianelli, et al.* 46 S.W.3d 730 (Tenn. Ct. App. 2001) (*McRedmond II*). For purposes of this appeal, we will briefly review the material facts. The case initially arose from a dispute over the MSA entered by and between Elk and Milano. Milano was specifically formed to provide the marketing services for Elk. Andrew Marianelli, Patrick McRedmond, and Louis McRedmond purchased Elk in 1966, and Mr. Marianelli, the majority shareholder, took over the operation of the company. The McRedmonds served on the Board of Directors (Board), but had no role in the day-to-day operations. Walter Marianelli, Andrew Marianelli's son, was also a member of the Board. In 1989, Andrew Marianelli was contemplating retirement. Walter Marianelli wished to take over the operation of Elk and to acquire his father's shares. However, Walter Marianelli did not have sufficient capital to purchase the shares. In order to achieve his goal, Walter Marianelli

[1] Prior to his death, Louis McRedmond filed a motion to remove himself as a Plaintiff in this action.

proposed a plan to the Board. The plan involved the formation of Milano to take over the marketing for Elk. Milano was owned by certain Elk managers. Milano entered into the MSA with Elk, whereby Milano would promote the sale of Elk products in exchange for Elk paying Milano 4% of its total sales up to $30 million, 6% of its sales in excess of $30 million, and 20% of any increases in Elk's net profits, based upon a three-year rolling average. Following a meeting on September 13, 1989, the Board unanimously agreed to implement the MSA and to allow same to take effect retroactively to September 1, 1989.

In the first three years of the MSA, Elk's sales increased. However, Elk suffered net losses of $1,857,597 during that period. At the same time, Milano's net income after taxes amounted to $4,130,429. Elk's profits rebounded to record levels in 1993, 1994, and 1995. The company showed losses again in 1996 and 1997.

On April 15, 1993, attorneys for thirty-two Elk shareholders addressed a demand letter to Elk and to seven directors of Elk and Milano. The letter asserted that the operation of the MSA was financially detrimental to the minority shareholders, and demanded that the Board terminate the MSA and file suit against Milano for the return of the fees it had collected. The directors decided not to respond to the demand, and, on August 16, 1993, the minority shareholders filed suit. The Complaint named seven defendants: Andrew Marianelli, Walter Marianelli, David Manning, Edwin S. Pyle, Gordon Ferragina, Tom Kellim, and Milano.[2] The Complaint asserted six claims:

1. Claims against the six individual defendants alleging breaches of their fiduciary duties as officers and/or directors of Elk.

2. Claims against Defendants Milano, Andre Marianelli, Walter Marianelli, Ferragina, Kellim and Manning alleging breaches of their fiduciary duties as controlling shareholders of Elk.

3. A claim asserting that the Derivative Plaintiffs were entitled to have the MSA set aside as a voidable transaction.

4. A claim of civil conspiracy asserted against all Defendants.

5. Aider and Abetter claims asserted against all Defendants.

6. A constructive trust claim against Milano.

On August 10, 1994, in response to a Motion to Dismiss filed on behalf of Elk, the Complaint was dismissed in its entirety. This dismissal was subsequently set aside by this Court, and the case was remanded to the trial court. See, *McRedmond, et al. v. Estate of Marianelli*, NO.

[2] All claims against Tom Kellim were dismissed by a Notice of Voluntary Dismissal filed on October 28, 1993, and an Agreed Order entered by the Court on November 3, 1993.

01A-01-9412-CH-00594, 1996 WL 697944, 1996 Tenn. App. LEXIS 773(Tenn. Ct. App. Dec. 6, 1996) ("*McRedmond I*"). An application for permission to appeal was denied by the Tennessee Supreme Court on May 5, 1997. Upon remand from *McRedmond I*, on October 2, 1998, the trial court entered a Memorandum and Order, wherein it granted partial summary judgment in favor of the Individual Defendants dismissing all claims relating to allegations that the MSA was not a validly approved conflict of interest transaction. By Memorandum and Order entered on February 9, 1999, the trial court granted summary judgment dismissing all of the Derivative Plaintiffs' remaining claims. The Derivative Plaintiffs again appealed to this Court.

In *McRedmond II*, this Court affirmed the dismissal of all claims asserted against Gordon Ferragina, and affirmed the dismissal of all claims asserted by the Derivative Plaintiffs against the other Defendants, with the exception of the breach of fiduciary duty claim. In reversing the trial court's grant of summary judgment on the issue of breach of fiduciary duty, this Court specifically noted that the obligation of a director, under Kentucky law, is to discharge his or her duties: (a) in good faith; (b) on an informed basis; and (c) in a manner he or she honestly believes to be in the best interest of the corporation. *McRedmond II* at 741. This Court also noted the provisions of Kentucky law providing that a director shall not be liable for monetary damages unless the director's failure to perform his or her duties amounts to willful misconduct or was wanton or reckless. *Id.* at 740. This Court further stated that the person claiming the breach of fiduciary duty bears the burden of proving, by clear and convincing evidence, that the breach was the legal cause of damages suffered by the corporation. *Id.* On the issue of breach of fiduciary duty, this Court held that "We do not conclude that all the conflicting evidence shows a breach of duty, but we do think that the evidence could support that conclusion. Therefore summary judgment on the fiduciary duty issue was improper." *Id*. at 739. In response to Defendants' request for reconsideration, this Court stated that the fact that the MSA was validly approved and the votes of the allegedly interested directors did not count does not, standing alone, establish that a valid claim of breach of fiduciary duty cannot be established by Plaintiffs. *Id.* at 741. This Court dismissed the Derivative Plaintiffs' claims against Gordon Ferragina holding that "he took no action that could be classified as a breach of fiduciary duty to Elk Brand." *Id*. at 739. This Court remanded the matter to the trial court stating:

> It appears to us that the plaintiffs have raised genuine questions of fact as to whether in formulating, investigating and acting upon the MSA, the individual defendants have conducted themselves in accordance with the above-quoted statute. We are not saying that they have not, but simply that they are not entitled to summary judgment on that question, and that the plaintiffs are entitled to their day in court.
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> *Id*. at 741-42.

In order to clarify the issues that remained following this Court's remand in *McRedmond II*, the trial court allowed the Derivative Plaintiffs to file a Second Amended Complaint on December 6, 2002. The Individual Defendants filed a Motion to strike certain portions of the Derivative Plaintiffs' Second Amended Complaint. The trial court granted the Individual Defendants' motion, and the Derivative Plaintiffs re-filed their Second Amended Complaint, sans the extraneous portions, on February 24, 2003.

The trial court ultimately decided that the following issues were to be decided on the second remand:

> The issue of whether officers, directors or majority shareholders breached their fiduciary duty to Elk Brand or minority shareholders as to the 1989 MSA between Elk Brand and Milano, and its renewal in 1994 remain to be tried. On this issue, Milano's liability is limited to its conduct concerning renewal of the MSA. Mr. Manning's liability is limited to conduct concerning renewal after he became a member of the Board. The other individual defendants, Andrew Marianelli, Walter Marianelli, and Edwin S. Pyle, were on the Board in 1989.
>
> The applicable law in this case is Kentucky law. It requires a director to perform his duties in good faith, on an informed basis, and in a manner he honestly believes to be in the best interest of the corporation. (Ky. Rev. Stat. §271 B.8-300(1)). The burden of proof is on the person claiming a breach of fiduciary duty by clear and convincing evidence. (Ky. Rev. Stat. §271 B.8-300(6)). A Director is not liable for monetary damages unless the Director's failure to perform his duties amounts to willful misconduct or was wanton or reckless. (Ky. Rev. Stat. §271 B.8-300(5)(b)).

On April 16, 2003, the Individual Defendants filed a Motion for Summary Judgment. In their Motion, the Individual Defendants specifically argued that the Derivative Plaintiffs had not presented proof of any conduct on the part of any of the Individual Defendants that would constitute breach of fiduciary duty owed to Elk.[3] By Order of May 23, 2003, the trial court denied the Individual Defendants' Motion for Summary Judgment "based upon the doctrine of the law of the case."

Beginning on June 23, 2003, the matter proceeded to trial before a jury of twelve. After the Derivative Plaintiffs completed their case-in-chief, the Individual Defendants moved for directed verdict, which was denied by the trial court. At the conclusion of all proof, the Individual Defendants renewed their motion for directed verdict. The trial court again denied the motion. On July 14, 2003, the jury returned a verdict against Walter Marianelli in the amount of $6,918,252.00 and against David Manning in the amount of $23,138.00. The jury also found that there was a breach of fiduciary duty by Andrew Marianelli and by Edwin S. Pyle; however, the jury concluded that said breaches of fiduciary duty were not the proximate cause of any damage to Elk. On August 6, 2003, the trial court entered its "Judgment on Jury Verdict," which adopted the verdict of the jury as the judgment of the trial court.

[3] A Motion for Summary Judgment was also filed on behalf of Milano. All claims against Milano were subsequently dismissed by the jury, and no claims remain pending against Milano.

The Individual Defendants filed their Motion for Judgment Notwithstanding the Verdict, or Alternatively, for Remittitur or for New Trial on August 1, 2003.[4] By Order of August 22, 2003, the trial court denied the Individual Defendants' Motion and specifically found that "the verdict made sense based on the proof and the law that has been applied to the case by the Tennessee Court of Appeals."

Following the entry of the August 6, 2003 judgment, the law firms that had represented the Derivative Plaintiffs during the course of the litigation filed motions with the trial court requesting awards of attorneys' fees and expenses from Elk pursuant to the common fund doctrine. In its Memorandum and Order of October 10, 2003, the trial court held that attorneys' fees in the case were recoverable under Kentucky's version of the common fund doctrine. While these and other post-trial motions were pending, the Nebel Law Firm (which represented the Derivative Plaintiffs during the trial) filed suit on behalf of the Derivative Plaintiffs in the Circuit Court for Christian County, Kentucky. By this suit, the Derivative Plaintiffs sought to dissolve Elk by judicial dissolution. At or about the same time that the dissolution suit was filed, Mr. Nebel sent a letter to counsel for the Individual Defendants demanding that Elk pay substantially all of the judgment obtained on behalf of the corporation to the minority shareholders, whom Mr. Nebel represented, in exchange for their stock in the corporation and to settle both the derivative lawsuit and the dissolution suit. Attorneys for Elk informed the trial court of the filing of the Kentucky dissolution lawsuit, and the demand letter. Elk also argued that the derivative plaintiffs, the Nebel Firm, and Mr. Nebel had breached their fiduciary duties to the corporation. The dissolution suit was dismissed on October 27, 2003, with leave to amend the complaint to name Elk as a defendant. In response to the dissolution suit, Milano, the Estate of Andrew Marianelli, and Walter Marianelli formed a new parent corporation, Elk Brand Manufacturing Company of Kentucky (New Elk Brand).

On October 31, 2003, New Elk Brand provided the shareholders of Elk with notice of a short-form merger, which would occur on or after December 1, 2003. In the merger, Elk would be merged into New Elk Brand and the minority shareholders' stock would be cashed out. The Derivative Plaintiffs attempted to prevent the merger by seeking a temporary restraining order, which the court denied on November 26, 2003. The Derivative Plaintiffs then sought to have the short-form merger declared void by a temporary injunction, which was also denied by the court on December 9, 2003.

Following the merger of Elk into New Elk Brand, and the cash-out of the minority shareholders, New Elk Brand asked the trial court to dismiss the plaintiffs Patrick McRedmond, Jr. and Monica Terry as derivative plaintiffs due to their lack of standing. The trial court dismissed all of the plaintiffs' claims as moot, including their right to appeal. However, the trial court specifically declined to dismiss the plaintiffs' claims for attorneys' fees, holding that these claims survived the merger.

An evidentiary hearing on the motions for attorneys' fees and expenses pursuant to the Kentucky common fund doctrine was held on May 6, 7, and 10, 2004. On June 1, 2004, the trial

[4] Pursuant to Tenn. R. App. P. 3(e), the motion specifically mentions each of the issues raised on appeal

court issued its Memorandum and Order awarding attorneys' fees and expenses to both the Nebel Firm and Sherrard & Roe. Sherrard & Roe was awarded $335,810 in fees. While the trial court awarded the Nebel Firm $1,967,078.33 in attorneys' fees and expenses, the court sanctioned the Nebel Firm $200,000.00 for the five-month delay caused by the Nebel Firm's discovery abuses. New Elk Brand filed its Notice of Appeal on June 11, 2004. The Individual Defendants, Walter Marianelli, David Manning, Edwin Pyle and the Estate of Andrew Marianelli, filed their Amended Notice of Appeal on July 1, 2004.

III. ISSUES PRESENTED FOR REVIEW

The Individual Defendants raise the following issues for review as stated in their brief:

> 1. Whether the trial court committed reversible error in refusing to include in the instructions to the jury specific statutory requirements contained in provisions of Kentucky law relating to a claim for monetary damages against a director relating to a conflict of interest transaction, after having indicated to counsel for the Individual Defendants that said instructions would be given, and instead advised the jury that a director is liable for a breach of fiduciary duty if the plaintiff can establish by clear and convincing evidence that the director did not act "solely in the interest of the corporation"?
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> 2. Whether the trial court committed reversible error in refusing to instruct the jury that all material facts had been disclosed to the Elk Brand Board of Directors, where this Court had already rejected assertions by the Derivative Plaintiffs that there were certain material facts that were not known by the disinterested directors and had held that the Elk Brand Board of Directors was "fully informed" relating to the approval and renewals of the MSA?
>
> 3. Whether the trial court committed reversible error in refusing to instruct the jury relating to the Kentucky statutory provisions relating to the approval of a conflict of interest transaction, in failing to advise the jury that the fairness of the MSA transaction was not an issue as the Court of Appeals had previously held, and in failing to instruct the jury that the directors are permitted to rely on the advi[c]e of professionals, after said instructions had been requested by Counsel for the Individual Defendants[5]?

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[5] We have reviewed the Individual Defendants' brief and cannot find a discussion of whether the trial court erred in not instructing the jury that the Directors could rely upon the advice of professionals. Though an issue may have been designated in the notice of appeal, a party's failure to brief it ordinarily constitutes waiver or abandonment of the issue. *Cf. Walsh v. B.A., Inc.*, 37 S.W.3d 911, 917 (Tenn.Ct.App.2000); *Maryville Housing Auth. v. Ramsey*, 484 S.W.2d 73, 74 (Tenn.Ct.App.1972). Generally speaking, appellate courts leave any unchallenged rulings as the trial court determined them. See, e.g., *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 66 (2d Cir.1998); *Berberian v. Mitchell*, 113 R.I. 438, 321 A.2d 431, 433 (R.I.1974). They are, in effect, affirmed. *In re. Estate of Freeman*, 240 So.2d 656, 657 (continued...)

4. Whether the trial court erred in refusing to grant judgment in favor of the Individual Defendants as a matter of law relating to claims of breach of fiduciary duty, where the Derivative Plaintiffs introduced no proof of any specific actions taken by any of the Individual Defendants in their capacity as a director other than to ensure that the disinterested directors were fully informed regarding the material facts relating to the transaction, under Kentucky law which requires clear and convincing evidence of conduct taken with reckless disregard for the best interest of the corporation in order to hold a director liable for monetary damages relating to a conflict of interest transaction?

5. Whether the trial court erred in admitting into evidence bank records which were not properly authenticated and which related solely to issues that had already been decided by this Court, namely, whether there was information known by the Individual Defendants which was not disclosed to the disinterested directors called upon to approve a conflict of interest transaction?

6. Whether the inconsistency of the jury verdict with the proof presented at trial, the Court's comments to the deadlocked jury, and counsel for the Derivative Plaintiffs' improper comments to the jury during Closing Argument, either standing alone or in their totality, require the reversal of the jury verdict?

New Elk Brand raises the following issues for review as stated in its brief:

1. Whether the Chancery Court erred as a matter of law in ordering Elk Brand Manufacturing Company (hereinafter "New Elk Brand") to pay the attorneys' fees and expenses of the former derivative plaintiffs where the then-derivative plaintiffs and the Law Offices of Tom Nebel, P.C. (hereinafter "the Nebel firm") took aggressive actions against the corporation to benefit themselves in breach of their fiduciary duties to the predecessors of New Elk Brand, also named Elk Brand Manufacturing Company (hereinafter "Old Elk Brand").

2. Whether the Chancery Court erred as a matter of law in ordering New Elk Brand to pay the attorneys' fees and expenses of the former derivative plaintiffs where counsel for the former derivative plaintiffs, Mr. Nebel and the Nebel firm, took action to the prejudice of Old Elk Brand in violation of their fiduciary duty to Old Elk Brand, the Rules of Professional Conduct, the discovery orders of the Chancery Court, and public policy.

[5](...continued)
(Fla.Dist.Ct.App.1970); *Luxon v. Caviezel*, 42 Wash.App. 261, 710 P.2d 809, 813 (Wash.Ct.App.1985). Consequently, we will not address this particular issue.

> 3. Whether the Chancery Court erred in its application of the Kentucky common fund doctrine in ordering New Elk Brand to pay the attorneys' fees and expenses of the former derivative plaintiffs in the amounts awarded to their current and former counsel.
>
> 4. Whether the Chancery Court erred when it failed to take immediate action to protect Old Elk Brand when the Chancery Court learned that the then-derivative plaintiffs and their counsel, the Nebel firm, had taken aggressive actions against the corporation to benefit themselves in violation of their fiduciary duties to Old Elk Brand.
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> 5. Whether the Chancery Court erred in applying the doctrine of election of remedies to excuse a breach of fiduciary duties owed to the very entity whose interests the fiduciaries were bound to protect.
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> 6. Whether the Chancery Court erred as a matter of law in disregarding T.C.A.§§23-3-101, 103, which prohibit the unauthorized practice of law by a person unlicensed in the State of Tennessee, and Formal Ethics Opinion 83-F-50 of the Board of Professional Responsibility of the Supreme Court of Tennessee, which prohibits the employment in any capacity in a law office of a disbarred attorney, and in awarding an attorneys' fees to the Nebel firm which included charges for the services of Ernest J. Szarwark, a felon convicted of mail fraud and disbarred by consent from the bars of the States of Indiana and Florida.

IV. ANALYSIS

We will first address the Individual Defendants' issues beginning with the assignments of error relating to the jury instructions. The standard for an appellate court's review of a trial judge's jury charge was stated in *City of Johnson City v. Outdoor West, Inc.*, 947 S.W.2d 855 (Tenn.Ct.App.1996):

> We review the jury charge in its entirety to determine whether the trial judge committed reversible error. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn.1992); *In re Estate of Elam*, 738 S.W.2d 169, 174 (Tenn.1987); and *Grissom v. Metropolitan Gov't of Nashville*, 817 S.W.2d 679, 685 (Tenn.Ct .App.1991). Jury instructions are not measured against the standard of perfection. *Grissom*, 817 S.W.2d at 685. The charge will not be invalidated if it "fairly defines the legal issues involved in the case and does not mislead the jury." *Otis*, 850 S.W.2d at 446; *Grissom*, 817 S.W.2d at 685. Furthermore, a particular instruction must be considered in the context of the entire charge. *Elam*, 738 S.W.2d at 174.
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> *Id.* at 858.

Following the pretrial conference in this case, the trial court entered its Memorandum and Order on June 16, 2003. Concerning the proposed jury instructions, the trial court stated:

> Finally, there are disputes between the parties on the law which applies to the case. In that regard, the Court concludes that it is required by Kentucky Statute 411.182 "Allocation of Fault and Tort Actions; Award of Damages; Effective Release" to submit an interrogatory to the jury as to the amount of damages attributable to each defendant. The Court further concludes that instructing the jury with TPI 3–Civil 3.30 Willful or Wanton Misconduct is consistent in keeping with Kentucky law. Finally, the Court shall use the proposed special jury instruction submitted by Mr. McKee and Mr. Branham [attorneys for Defendant Milano] on breach of fiduciary duty and liability of director.

On June 20, 2003, the trial court entered an Order, which "clarifies its June 16, 2003 order as follows":

> (2) The Court did rule on the issue of burden of proof in the last sentence of paragraph 5 of the June 16, 2003 order by referring to a proposed jury instruction submitted by the defendants. The proposed instruction was signed by Mr. McKee and Mr. Branham as well as Mr. Booker [attorney for Defendant Elk]. The Court incorrectly believed it was submitted by Mr. McKee and Mr. Branham, so the Court referenced the instruction in its order as one filed by Mr. McKee and Mr. Branham. The instruction, however, apparently was submitted by Mr. Booker. By describing the instruction in the June 16, 2003 order as one submitted by Mr. McKee and Mr. Branham the Court caused confusion. Simply stated, the Court's ruling is that the burden of proof is on the plaintiff–the person claiming the breach–to prove breach by the defendants (both the individual defendants and Milano Corporation) by clear and convincing evidence. So there is no mistake, the jury instruction the Court was referring to in that last sentence of paragraph 5 of the June 16, 2003 order is attached hereto as Exhibit A.

Exhibit A to the June 20, 2003 Order is the "Proposed Special Jury Instructions of Defendants," which reads, in pertinent part, as follows:

> **1. <u>BREACH OF FIDUCIARY DUTY</u>**
>
> In this case, Plaintiffs have alleged a breach of fiduciary duty on the part of each of the Defendants. Therefore, you must determine, based on the instructions that I give you, whether the conduct of any of the Defendants was such as to constitute a breach of fiduciary duty.
>
> A fiduciary is [a] person or entity holding the character of a trustee. A fiduciary duty is the duty to act primarily for another's benefit. With respect to directors in a close corporation, they are required to act in the utmost good faith,

and they impliedly undertake to give to the enterprise the benefit of their care and best judgment and to exercise the powers conferred solely in the interest of the corporation and not for their own personal interests. A fiduciary is not an insurer, but is bound to exercise good faith and due diligence.

2. LIABILITY OF A DIRECTOR

Elk Brand Manufacturing Corporation, although its principal office is located in Tennessee, is a corporation incorporated in Kentucky. Therefore, the law that governs the obligations of its Directors is Kentucky law.

Under Kentucky law, a director is required to discharge his or her duties as a director, including his duties as a member of a committee, in good faith, on an informed basis and in a manner he or she honestly believes to be in the best interest of the corporation. In the case of an action for monetary damages, as we have in this case, the person bringing the claim (the Plaintiffs, Monica Terry and Patrick McRedmond, Jr.) have the burden of proving by clear and convincing evidence that the directors in question did not act in good faith, on an informed basis and in a manner he honestly believed to be in the best interest of the corporation.

Under Kentucky law, a person bringing a claim alleging breach of fiduciary duty by a director has the burden of proving the breach of fiduciary duty by clear and convincing evidence. To prove an issue by clear and convincing evidence the party having the burden of proof must clearly show that there is no serious or substantial doubt about the conclusions that party is attempting to prove.

If you find that any of the Individual Defendants breached any fiduciary duty owed to Elk Brand, Plaintiffs then have the additional burden of proving that the breach of fiduciary duty constitutes willful misconduct or wanton or reckless disregard for the best interest of the corporation. Willful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.

Under Kentucky law, a person bringing a claim alleging a breach of fiduciary duty by a director also has the burden of proving that the breach or failure to perform was the legal cause of damages suffered by the corporation. A legal cause of any injury is a cause which, in natural and continua[l] sequence, produces an injury, and without which the injury would not have occurred.

(Internal footnotes omitted).

At the close of all proof, the trial court provided counsel for all parties a copy of the proposed jury instructions. At that time, the trial court indicated that the conflict of interest transaction proposed instructions, which the trial court had previously stated it would use (***see*** *supra*), might not be given to the jury, to wit:

> THE COURT: . . . Lawyers, how long do you need to look at the instructions and the verdict form that I've proposed?
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> MR. BOOKER: Can I raise one issue?
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> THE COURT: Yes, sir.
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> MR. BOOKER: I'm not sure if it was intentional [or an] oversight, but the instruction that we had given would be given a conflict of interest transaction. I know there was a question, but I didn't see that.
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> THE COURT: It's not in there. Did you read the memo that I prepared to th[e] lawyers, and it said in that second to last paragraph, "I'm going to ask you, Ms. Gillespie, to point out to the Court why I should give that particular instruction?" I didn't put it in my proposed instructions because, you know, one may not give it, or two may not.

During the charge conference, counsel for the Individual Defendants made the following plea for inclusion of a conflict of interest transaction instruction, instructions confirming the fairness of the MSA, and an instruction that directors are permitted to rely upon the advice of professionals, to wit:

> MR. BOOKER: I guess most critically was the instruction regarding conflict of interest transaction, which we had our pretrial conference, Your Honor, we thought it was going to be given to the jury, and certainly we prepared for trial assuming that would be given equal mention in the opening statements, the fact that it had already been established that the MSA was validly approved . . . . And my concern is that without this context of the conflict of interest statute, I don't know how the jury would decide the breach of fiduciary duty issue. They may decide that by voting for it [the MSA], that breached the fiduciary duty. And I think that Your Honor was correct when Your Honor ruled in the pretrial conference that this instruction would be–would be given.
>
> THE COURT: Let me ask you a question about that. I'm sensitive to the fact that the jury may draw incorrect conclusions, may hold it against these directors because there were conflicts of interest and they need some instruction.... [In *McRedmond II*,] the Court of Appeals–they say it very well. They talk about that the transaction can be considered authorized, approved, or ratified where you've

got the material facts of the conflict of interest disclosed and the majority of disinterested directors. And then they go on, and they say, "That creates a frame work for you to enter into it." And then they talk about, however, that doesn't shield directors from liability for breach of fiduciary duty. It's stated very simply. They don't get into the details of the Kentucky statute. And what I had considered on conflict of interest was to use their language so, one, it would instruct the jury how to consider this conflict of interest testimony, but it wouldn't be so burdensome as giving them a recitation for Kentucky law.

MR. BOOKER: The concern is, obviously, when the Court of Appeals wrote its opinion, it was on the request for reconsideration. I think it was taken out of the context of this prior opinion–

THE COURT: True.

MR. BOOKER: –and all it was really trying to do was just fill in the gaps. The jury doesn't have that context. All they'll have about conflict of interest transactions is what Your Honor tells them. And without this context, I don't see any way they can know what they're supposed to be deciding without knowing what the statute provides, and that the transaction has already been approved....and we've been telling the jury all along that it's already been approved, and we went into the language of the statute with them. I just don't know how they'd put that in context without some frame work for it. But I think the Court of Appeals was assuming that frame work in its wording, I think, to kind of make it bare bones....

THE COURT: Okay. Anything else?

MR. BOOKER: In the Court of Appeals opinion, they indicate the issue of fairness that had already been resolved. I think that would also be the law of the case, and that's not anywhere in Your Honor's instruction. And the third point is that–we request that that be included, that the fairness issue has already been resolved.

And then the third point would be, under Kentucky law, there's–by statute, it makes reference to directors being allowed to rely on the opinion of, among others, attorneys and accountants. I would suggest that that be included in the instruction as well.

Following this discussion and a review of the jury charge, the trial court made the following ruling:

> THE COURT: After listening to arguments of counsel, the Court has made the following changes on Exhibit 1 to the charge conference: Starting on page 7, the Court has added text to the fiduciary duty instruction. The Court adopted some of Mr. Booker's language about the conflict of interest transaction, and then the Court took additional language from the petition to rehear McRedmond-2....

Mr. Booker then made the following objections to the proposed instructions:

> MR. BOOKER: The language that was added regarding the conflict of interest transaction, I guess, two points. It doesn't make reference to the fact that the presence of interested directors at the meeting and their vote doesn't affect the validity. We would ask that that be added.
>
> THE COURT: The Court attempted to simply incorporate that concept in its third paragraph. "Material facts in the marketing services agreement and the conflict of interest were disclosed to a majority of disinterested directors who voted in favor of the marketing services agreement." That's the way I handled that. I understand you want more, but I feel like that addresses it enough without confusing it....
>
> MR. BOOKER: Your Honor may have understood it in denying it, but it does say the fact that others were present and voted. Because, again, the jury might think that breached the fiduciary duty just by being there and participating in the discussion.
>
> THE COURT: The Court notes your objection.
>
> MR. BOOKER: Then the second point is, it says material facts. We request that it say all material facts, since, again, the jury might find that material facts are not necessarily included.
>
> THE COURT: The Court notes your objection....

The trial court then read the jury instructions to the Jurors, and a copy of the instructions was also provided to the jury when they retired for deliberation. On appeal, the Individual Defendant contends that the charge as given constitutes error because it: (1) does not include the specific statutory requirements of Kentucky relating to a claim for monetary damages against a director relating to a conflict of interest transaction; (2) did not instruct the jury that all material facts relating to the approval of the MSA had been disclosed to Elk's Board of Directors; (3) did not inform the jury that the fairness of the MSA transaction was not at issue; and (4) did not instruct the jury that directors are permitted to rely on the advice of professionals. We will address each of these assignments of error in turn.[6]

We first note that, where the court correctly charges the law applicable to the case, it is not error to deny a special request that embodies a theory of a party if the court charges in general terms and with clearness sound propositions of law which would guide the jury in reaching a correct decision in the case. See *St. Louis I.M. & S. Ry. Co. v. Hatch*, 94 S.W. 671, 674 (Tenn. 1906). The rule is stated in *Mitchell v. Smith*, 779 S.W.2d 384(Tenn. Ct. App.1989):

> Trial courts should give a requested instruction if it satisfies three requirements: (1) it is supported by the evidence, (2) it embodies the party's theory, (3) it is a correct statement of the law. *Hayes v. Gill*, 216 Tenn. 39, 42-43, 390 S.W.2d 213, 214 (1965); *Strickland v. City of Lawrenceburg*, 611 S.W.2d 832, 837 (Tenn.Ct.App.1980); *Tallent v. Fox*, 24 Tenn.App. 96, 114-15, 141 S.W.2d 485, 497 (1940). However, they need not give a special instruction whose substance is already covered in the general charge. *Jack M. Bass & Co. v. Parker*, 208 Tenn. 38, 49, 343 S.W.2d 879, 884 (1961); *Austin v. City of Memphis*, 684 S.W.2d 624, 636 (Tenn.Ct.App.1984).

Id. at 390.

A. Whether the trial court erred in regarding the jury instructions relating to the duty of corporate fiduciaries in a conflict of interest transaction pursuant to Kentucky law

Ky. Rev. Stat. Ann. §271B.8-305 reads, in pertinent part, as follows:

> 271B.8-300 General standards for directors
>
> (1) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (a) In good faith;
> (b) On an informed basis; and
> (c) In a manner he honestly believes to be in the best interests of the corporation.
>
> (2) A director shall be considered to discharge his duties on an informed basis if he makes, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, inquiry into the business and affairs of the corporation, or into a particular action to be taken or decision to be made.

[6] *But see* footnote 5.

> (3) In discharging his duties a director shall be entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
>> (a) One (1) or more officers or employees of the corporation whom the director honestly believes to be reliable and competent in the matters presented;
>> (b) Legal counsel, public accountants, or other persons as to matters the director honestly believes are with the person's professional or expert competence; or
>> (c) A committee of the board of directors of which he is not a member, if the director honestly believes the committee merits confidence.
>
> (4) A director shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (3) of this section unwarranted.
>
> (5) In addition to any other limitation on a director's liability for monetary damages contained in any provision of the corporation's articles of incorporation adopted in accordance with subsection (2)(d) of KRS 271B.2- 020, any action taken as a director, or any failure to take any action as a director, shall not be the basis for monetary damages or injunctive relief unless:
>
>> (a) The director has breached or failed to perform the duties of the director's office in compliance with this section; and
>> (b) In the case of an action for monetary damages, the breach or failure to perform constitutes willful misconduct or wanton or reckless disregard for the best interests of the corporation and its shareholders.
>
> (6) A person bringing an action for monetary damages under this section shall have the burden of proving by clear and convincing evidence the provisions of subsection (5)(a) and (b) of this section, and the burden of proving that the breach or failure to perform was the legal cause of damages suffered by the corporation.

Following is the relevant portion of the charge to the jury concerning the general duties of a fiduciary. The instructions include both the trial court’s oral charge and the written charge. We note that some of the oral instructions are not included in the written charge, although all of the written charge was read to the jury. For purposes of clarification, we will emphasize (with italics) those portions of the charge that are extraneous to the written charge and which were only spoken to the jury. The portions in normal type were both spoken and included in the written charge:

Now, let's turn to a different area of the law. And this has to do with the duties of the defendants. I'm going to talk to y'all about fiduciary duty. The dispute involved in this litigation relates to a transaction between Elk Brand Manufacturing Company and Milano Corporation. Elk Brand is a corporation organized under the laws of the State of Kentucky. The plaintiffs are minority shareholders of Elk Brand. Two of the defendants, either currently or in the past, have owned an interest in the Milano Corporation. Walter Marianelli owned approximately 80 percent of the stock of Milano Corporation, and David Manning owned 1 percent of the stock of Milano Corporation. Walter Marianelli and David Manning have also served on the board of directors of Elk Brand.

A transaction with a corporation in which a director of the corporation has a direct or indirect interest is referred to as a conflict of interest transaction. It's already been determined by law in this case that the defendants' conflict of interest did not render the marketing services agreement void. Material facts of the marketing services agreement and conflicts of interest were disclosed to a majority of disinterested directors who voted in favor of the marketing services agreement.

But even though the law allows corporations to enter into binding agreements where there are conflicts of interest, that does not shield corporate directors and majority dominant shareholders from liability for breach of their fiduciary duty. Andrew Marianelli, Walter Marianelli, Edwin S. Pyle, and David Manning, as directors of Elk Brand and Milano Corporation as a majority controlling shareholder, had, by law, a fiduciary duty to Elk Brand. A fiduciary is a person or an entity holding the character of a trustee. A fiduciary duty is the duty to act primarily for another's benefit. A fiduciary is not an insurer, but is bound to exercise good faith and due diligence. In this case, the fiduciary duty of the defendants also required them to discharge their duties as directors, including duties as a member of a committee, in good faith on an informed basis and in a manner they honestly believed to be in the best interest of Elk Brand. Breach of any one or more of these three duties constitutes a breach of fiduciary duty by defendants. As directors in a close corporation, the defendants were required to act in the utmost good faith, and the[y] impliedly undertook to give to the enterprise the benefit of their care and best judgment and to exercise the powers con[ferred] solely in the interest of the corporation and not for their own personal interest.

You are to determine whether in formulating, investigating, and acting upon the MSA–*and that's the marketing services agreement*–the individual defendants conducted themselves in accordance with these duties. In determining whether defendants had an honest belief that the MSA was in the best interest of Elk Brand, you are not obligated to believe the defendants' testimony that they held such an honest belief.

In addition to these general instructions, the trial court further instructed the jury as follows:

> *We've now had some instructions on evidence and fiduciary duty. Let's turn to burden of proof.* In this action, the plaintiffs have the burden of establishing, by clear and convincing evidence, that the defendants breached a duty. Clear and convincing evidence means that there is no serious or substantial doubt about the conclusions the party is attempting to prove.
>
> If you find that any of the defendants breached a duty owed to Elk Brand, plaintiffs have the additional burden of proving that the breach of duty constitutes willful misconduct or wanton and reckless disregard for the best interest***s*** of the corporation. Willful or wanton misconduct is intentional wrongful conduct done either with knowledge that serious injury to another will probably result, or *that the* wanton and reckless disregard *caused the* results.
>
> Plaintiffs also have the burden of proving the breach o[r] failure to perform was the legal cause of damages suffered by the corporation. A legal cause of any injury is a cause which, in natural and continuous sequence, produces an injury, and without which the injury would not have occurred.

The Individual Defendants first contend that the trial court's instructions "greatly lessened the Derivative Plaintiffs' burden of proof." We disagree. As set out above, Ky. Rev. Stat. Ann. §271B.8-305(6) clearly requires a plaintiff to prove a breach of fiduciary duty by clear and convincing evidence. The jury instructions, as set out just above, clearly reflect this burden of proof.

The Individual Defendants also take issue with the trial court's use of allegedly conflicting terms in the general duties of a fiduciary portion of the instructions. Specifically, the trial court states that "[a] fiduciary duty is the duty to act *primarily* for another's benefit" (emphasis added). Shortly thereafter the trial court states "[a]s directors in a close corporation, the defendants were required to act in the utmost good faith, and the[y] impliedly undertook to give to the enterprise the benefit of their care and best judgment and to exercise the powers con[ferred] *solely* in the interest of the corporation and not for their own personal interest" (emphasis added). The Individual Defendants contend that the use of "primarily" and "solely" creates a conflict in the instructions, and that this conflict confused the jury such that the verdict should be thrown out. We disagree.

We first note that the Individual Defendants' own proposed jury instructions, ***see*** *supra*, contain the exact conflicting language that they now complain about, to wit:

> A fiduciary is [a] person or entity holding the character of a trustee. A fiduciary duty is the duty to act <u>primarily</u> for another's benefit. With respect to directors in a close corporation, they are required to act in the utmost good faith, and they impliedly

> undertake to give to the enterprise the benefit of their care and best judgment and to exercise the powers conferred <u>solely</u> in the interest of the corporation and not for their own personal interests**.**
>
> (Emphasis added).

Nonetheless, the use of these two words did lead the jury to submit a question to the court. However, we must view the conflicting language in the context of the instructions as a whole. After reviewing the instructions as a whole (which track the language of the applicable Kentucky statute), and the trial judge's response to the jury's question, we find that the jury charge in its entirety, and the response to the jury's inquiry, "fairly define[ ] the legal issues involved in the case and [do] not mislead the jury." *City of Johnson City*, 947 S.W.2d 855, 858 (Tenn. Ct. App. 1996).

B. Whether the trial court erred in failing to instruct the jury that all material facts relating to the approval of the MSA had been disclosed to Elk's Board of Directors and Whether the trial court erred in failing to inform the jury that the fairness of the MSA transaction was not at issue

In *McRedmond II*, this Court found that the MSA at issue in this case was approved "by a majority of the disinterested directors who were fully informed as to the material facts of the transaction." *McRedmond II* at 738. The Derivative Plaintiffs' assertions that there were certain material facts that were not known to the disinterested directors were specifically rejected by this Court. *Id*. This Court further held that, "[s]ince the court found that Patrick McRedmond and Curtis Brasher were both disinterested and were fully informed, it was not required to make any factual finding within the context of the Kentucky conflict of interest law regarding the fairness of the M.S.A. transaction. Thus, the trial court's finding that the M.S.A. was fair need not be reviewed by this court...." *Id*. The Individual Defendants assert that the trial court committed reversible error in giving this instruction:

> It's already been determined by law in this case that the defendants' conflict of interest did not render the marketing service agreement void. Material facts of the marketing service agreement and conflicts of interest were disclosed to a majority of disinterested directors who voted in favor of the marketing services agreement.

Specifically, the Individual Defendants argue that the charge is fatally flawed in that it fails "to instruct the Jury that <u>all</u> material facts relating to the MSA had been disclosed." We disagree. In the opinion of this Court, the omission of the word "all" from the trial court's instruction that the "[m]aterial facts of the marketing service agreement...were disclosed" does not rise to the level of reversible error. Likewise, the trial court's statement that the "defendants' conflict of interest did not render the marketing service agreement void" is sufficient to inform the jury that the fairness of the MSA is not before them.

C. Whether the trial court erred in refusing to grant judgment in favor of the Individual Defendants as a matter of law relating to claims of breach of fiduciary duty

The Individual Defendants contend that the trial erred in not directing a verdict in their favor on the issue of breach of fiduciary duty. We disagree. When deciding a motion for directed verdict, both the trial court and the reviewing court on appeal must look to all the evidence, take the strongest legitimate view of the evidence in favor of the opponent of the motion, and allow all reasonable inferences in favor of that party. The court must discard all countervailing evidence, and if there is then any dispute as to any material fact, or any doubt as to the conclusions to be drawn from the whole evidence, the motion must be denied. See *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 647 (Tenn.1995); *Hurley v. Tennessee Farmers Mut. Ins. Co.*, 922 S.W.2d 887, 891 (Tenn. Ct. App. 1995).

We have discussed the applicable Kentucky law and the applicable burden of proof in the jury instructions sections, *supra*. In order to meet their burden in this case, the Derivative Plaintiffs were required to provide clear and convincing evidence that the action(s) taken by the Defendants Manning and W. Marianelli constituted willful misconduct done with reckless disregard for the best interest of Elk, and which was the legal case of damage to Elk. Upon review of the voluminous record in this case, we agree with the trial court that the evidence is not susceptible to only one conclusion. Because there is sufficient evidence to create doubt as to whether Messrs. W. Marianelli and Manning breached their respective fiduciary duties to Elk Brand, the trial court properly allowed the case to go to the jury. See *Crosslin v. Alsup*, 594 S.W.2d 379, 380 (Tenn. 1980).

D. Whether the trial court erred in admitting bank record evidence

We first note that the trial court is afforded wide discretion in the admission or rejection of evidence, and the trial court's action will be reversed on appeal only when there is a showing of an abuse of discretion. See *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439 (Tenn.1992); *Davis v. Hall*, 920 S.W.2d 213, 217 (Tenn.Ct.App.1995). The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives. *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn.Ct.App.2000). While we will set aside a discretionary decision if it does not rest on an adequate evidentiary foundation or if it is contrary to the governing law, we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative.

______The crux of the Individual Defendants' argument on appeal is that the bank records were somehow inaccurate or incomplete. These records were presented for admission through a records custodian affidavit, which is governed by T.C.A. §45-10-101 et seq. Specifically, the statute requires that the records custodian's affidavit "shall be admissible in evidence and the matters stated therein shall be presumed true <u>in the absence of a preponderance of the evidence to</u>

the contrary" (emphasis added). Although the Individual Defendants now argue that the record custodian affidavit from SunTrust was inaccurate because, *inter alia*, it referenced documents that were not included in the actual bank records produced, there is no indication that the Individual Defendants were denied an opportunity to subpoena the records custodian to testify on their behalf. Nor is there any indication that the Individual Defendants attempted to conduct their own discovery regarding the bank records. Rather, when asked about the bank records, Mr. W. Marianelli testified that there was no basis to believe the records were distorted, to wit:

> Q [to Mr. W. Marianelli]: You don't have any reason to believe, for one minute, that the bank intentionally distorted any of the information–
>
> A. No, sir.
>
> Q. –in the document?
>
> A. No, sir. I don't.
>
> Q. And you don't have any reason to believe that the bank was negligent in the way it created documents relating to Elk Brand, do you?
>
> A. No, sir.

From the record as a whole, and especially in light of Mr. W. Marianelli's own testimony, we cannot conclude that the trial court abused its discretion in allowing the bank records to come into evidence.

E. Whether the trial court erred in response to the jury's statement that the jury was deadlocked

After one and one-half days of deliberations, the jury advised the trial court as follows: "We may not be able to agree on any of these issues?!! After 1 ½ days deliberation we have only voted on 4 questions & some of the jurors have serious doubt?" Counsel for the Individual Defendants then suggested that the jury be advised that, if the jury was deadlocked on the first four issues, that the jury be instructed to deliberate on the remaining issues to determine whether a verdict could be reached on any issue. The trial court, however, determined that the jury should be referred to the Instructions As to Unanimous Verdict, which reads:

> The verdict you return to the Court must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to each answer. Your verdict must be unanimous.
>
> It is your duty to consult with one another and to reach an agreement if you can do so without violence to individual judgment. Each of you must decide the case for

> yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is not correct. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

In addition to referring the jury to this portion of the instructions, the trial court also advised the jury, "Do not feel hurried." The Individual Defendants submit that this comment was inappropriate. Specifically, the Individual Defendants contend that "the instruction not to feel hurried most likely would lead a jury to conclude that the only way they could conclude the process was for some jurors to surrender their convictions for the purpose of reaching a verdict," and that this instruction "likely gave the jurors the impression that being deadlocked was not an option and that their jury service would have to continue for some indeterminate additional period of time unless a verdict was reached." The Individual Defendants have provided no affidavits from juror(s) to support their contention that the "Do not feel hurried" instruction misled the jury in reaching their unanimous decision.

In *Kersey v. State*, 525 S.W.2d 139 (Tenn.1975), our Supreme Court directed that trial courts in Tennessee, when faced with deadlocked juries, comply with § 5.4 of the ABA Standards Relating to Trial by Jury and rejected the Allen or "dynamite" charge when the jury is at an impasse. *Kersey*, 525 S.W.2d at 144-45. § 5.4 of the ABA Standards Relating to Trial by Jury reads:

> 5.4 Length of deliberations; deadlocked jury.
>
> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> > (i) that in order to return a verdict, each juror must agree thereto;
> > (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
> > (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
> > (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
> > (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided

in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

Kersey at 144-45.

In the instant case, the Chancellor's comment to the jury cannot be construed as a "dynamite" or "Allen" charge, nor can we conclude that said comment was coercive in any way. The trial court's telling the jury "Do not feel hurried" in no way requires or threatens the jury to deliberate for an unreasonable length of time, nor does it admonish the individual jurors to give up their convictions. Rather, the Chancellor's statements are well within the applicable ABA Standards Relating to Trial by Jury, ***see*** *supra*, and, consequently, do not constitute reversible error.

F. Whether the Plaintiffs' Counsel's closing argument created reversible error

In general, the control over the argument of counsel resides with the trial court, and the trial court has broad discretion as to what shall and shall not be permitted in argument. The appellate courts generally will not interfere with the discretionary action of a trial court in refusing to grant a mistrial or a new trial for misconduct of counsel in argument unless the argument is clearly unwarranted and made purely for the purpose of appealing to passion, prejudices and sentiment which cannot be removed by sustaining the objection of opposing counsel. *Perkins v. Sadler*, 826 S.W.2d 439, 442 (Tenn.Ct.App.1991). The Individual Defendants cite the following portions of the closing argument, and argue that each is inappropriate under the above standard:

- More than half of Americans don't believe what corporate officers and directors say. They don't believe it. And there's good reason for that, as we've seen, Enron, WorldCom, all these scandals where insiders have paid themselves millions and millions of dollars in sweet, crooked deals.

- Well, I'll tell you, you've got the power–as a jury in this case, you've got the power to make this right. And if we don't make it right, all of us might as well take our money and bury it in the backyard in a tin can or put it in a mattress. Because if insiders can make these kind of sweet[heart] deals, if they can deal with your money or minority shareholder money and make themselves fabulously rich–and I've got to tell you, anybody who's got $15 million in stock and these kind of salaries I would have to characterize as fabulously rich.

- And the answer to that is, so what? Because in the Enron transactions or all these things we've seen, it doesn't matter whether the board of directors approved it or not. The question is, is the transaction done solely in the interest of the corporation or because of personal interest?

! And really, if we're ever going to get past this crisis in confidence in this country, we've got to start making people accountable. We've got to make them accountable.

! It's important really to this community, and that's not an exaggeration. Because if we allow people who have position and power to come in and put together these kind of schemes–and that's what this is–and then to get away with it, and frankly take the stand and take on positions that strain the truth, at best, then we're all going to be affected by it.

We note from the record that the Individual Defendants made no objection to any of these arguments by the Derivative Plaintiffs' attorney. It is well settled that a party who fails to take reasonable steps to cure an error is not entitled to relief on appeal. Tenn. R.App. P. 36(a). An objection to the remarks or conduct of counsel must be made at the trial and a ruling had thereon, or they will not be considered on appeal. See *Morgan v. Duffy*, 30 S.W. 735 (Tenn. 1895). Because the Individual Defendants' counsel made no objection at the time of the argument, and because he did not request the trial judge to ask the jury to disregard the argument, we find no error. See *Miller v. Alman Construction Co.,* 666 S.W.2d 466, 469 (Tenn. Ct. App.1983).

G. Whether the jury verdict is supported by the weight of the evidence

It is well settled that the Court of Appeals does not re-weigh the evidence or reevaluate witnesses' credibility in an appeal from a jury verdict. *Grissom v. Metropolitan Gov't of Nashville,* 817 S.W.2d 679 (Tenn.Ct.App.1991). This Court, on appeal, is required to take the strongest legitimate view of the evidence favoring the prevailing party, discard all contrary evidence, allow all reasonable inferences to uphold the jury's verdict and set aside the jury verdict only when there is no material evidence to support it. Tenn. R. App. P 13(d); see also *Smith County v. Eatherly*, 820 S.W.2d 366 (Tenn.Ct.App.1991); *Glover v. Oakwood Terrace Associated II,* 816 S.W.2d 43 (Tenn.Ct.App.1991). From our review of the entire record, we find that there is sufficient evidence from which the jury could have reached its verdict against the Individual Defendants in this case.

For the foregoing reasons, we affirm the judgment of the trial court entered upon the jury verdict. Having determined that the judgment of the trial court should stand, we now turn to the issues regarding attorney's fees. We will first address those issues concerning whether attorney's fees should have been allowed in this case. If we determine that the trial court was correct in allowing the attorney's fees, then we will address the issues concerning the reasonableness of those fees.

H. Applicability of the Kentucky common fund doctrine

The applicability of the Kentucky common fund doctrine is a question of law. See *Kline ex rel. Kline v. Eyrich*, 69 S.W.3d 197, 203 (Tenn. 2002). As such, we will review the trial court's decision to apply the Kentucky common fund doctrine *de novo* upon the record with no presumption of correctness. Tenn. R. App. P. 13(d); *Waldron v. Delffs*, 988 S.W.2d 182, 184 (Tenn. Ct. App. 1998); *Sims v. Stewart*, 973 S.W.2d 597, 599-600 (Tenn. Ct. App. 1998). Both Tennessee and Kentucky law subscribe to the "common fund doctrine," also known as the "common benefit doctrine." This doctrine applies "when the attorney 'has succeeded in securing, augmenting, or preserving property or a fund of money in which other people are entitled to share in common.'" *Kline*, 69 S.W.3d at 204 (quoting *Travelers Ins. Co. v. Williams*, 541 S.W.2d 587, 589-90 (Tenn. 1976)). "In such a case, the attorney may oblige the beneficiaries of the fund or property to contribute to his or her fee by assessing that fee directly against the fund or property itself." *Id.* Because both Tennessee law (which governs the procedural aspects of this case) and Kentucky law (which governs the substantive aspects of this case) both apply the common fund doctrine, we find it unnecessary to address the question of whether an award of attorney's fees is governed by procedural or substantive law. We do note, however, that, although both Sherrard & Roe and Elk initially urged the application of Tennessee law on the issue of attorney's fees, the trial court applied Kentucky law in awarding same. The question is whether the common fund doctrine (either under Tennessee or Kentucky law) applies under the facts of this case. We find that it does.

The common fund doctrine is "designed to spread attorney's fees among various beneficiaries to a fund, and it is supported by two primary rationales." *Kline*, 69 S.W.3d at 204. "First, the doctrine prevents the beneficiaries of legal services from being unjustly enriched by requiring them to pay for those services according to the benefit received." *Id*. "Second, the doctrine serves to spread the costs of litigation proportionally among all of the beneficiaries so that the plaintiff does not bear the entire burden alone." *Id*. "Indeed, in furtherance of this latter rationale, the doctrine may be applied irrespective of whether the other beneficiaries to the common fund actually receive the benefits of the common fund." *Id.*

In the instant case, Elk asserts that no benefit has been bestowed upon it and, therefore, an award of attorney's fees is not justified under the common fund doctrine. We disagree. In its Memorandum and Order, the trial court states that "[t]he efforts of the plaintiffs for the last 13 years, prior to filing the dissolution suit, have resulted in a $6.9 million jury verdict to return funds to Elk Brand." Furthermore, Elk also received the right to recover all attorney's fees advanced to the directors and officers found liable by the jury. From a legal standpoint, the judgment and the right to recover fees advanced on behalf of its liable officers and directors are substantial benefits and are the type contemplated by the common fund doctrine. See, e.g., *Grant v. Lookout Mountain Co.*, 28 S.W. 90, 93 (Tenn. 1984); *Howes v. Atkins*, 668 F. Supp. 1021 (E.D. Ky. 1987). Nonetheless, Elk contends that, because it has chosen not to collect the judgment or seek reimbursement of attorney's fees, there is no "fund" from which an award of attorney's fees may be made. We find this argument unpersuasive. In the first instance, the judgment and recovery of attorney's fees enures to Elk's benefit regardless of whether it chooses to enforce same. Also, it does not escape this Court's notice that, prior to the short-form merger, Mr. W. Marianelli seemed to be in control of that corporation as evidenced, *inter alia*, by the fact that Walter Marianelli, under the Kentucky short form merger statute, gave the thirty-day notice, on October 31, 2003, that Elk was being merged into Elk Brand Manufacturing Company of Kentucky (New Elk Brand), a corporation to be owned by Walter Marianelli. It is not inconceivable that Elk's decision to simply not collect that to which it is entitled is a decision helmed by Mr. W. Marianelli, against whom the judgment falls.

Finally, in its argument that the common fund doctrine is not applicable, Elk points to the short-form merger that, according to the trial court's finding, stripped the Derivative Plaintiffs of their status as plaintiff in this case due to a lack of standing. This post-judgment fact does not, however, negate the Judgment that accrued prior to the merger. The trial court was correct in its determination that the award of attorney's fees survives the merger and, under the common fund doctrine, Elk is liable for attorney's fees in this case.

I. Whether the conduct of Tom Nebel, The Nebel Firm and/or the Derivative Plaintiffs warrants forfeiture of the attorney's fees

(1) The Kentucky dissolution lawsuit

As discussed above, following the entry of Judgment against the Individual Defendants in this case and while the post-judgment motions for attorney's fees were pending, the Nebel Firm filed suit on behalf of the then-Derivative Plaintiffs in the Circuit Court for Christian County, Kentucky, seeking judicial dissolution of Elk. In its "Memorandum and Order" of December 9, 2003, denying the Derivative Plaintiffs' application for a temporary injunction to halt the corporate merger, the trial court described the filing of this suit as "an act taken solely to benefit the minority shareholders," and an act "inimical to [Old] Elk Brand." Following the short-form merger of Old Elk Brand into New Elk Brand, the Derivative Plaintiffs dismissed their Complaint for dissolution without prejudice.

On appeal, Elk contends that the actions of the Nebel Firm and the Derivative Plaintiffs in filing suit for dissolution of Elk constitutes a breach of the Derivative Plaintiffs' and their attorneys' fiduciary duty to Elk and, as such, should result in a forfeiture of the attorney's fees awarded. We find this position to be unsupported by the record before us. Although the Nebel Firm and the Derivative Plaintiffs appear to take an inconsistent position in filing suit to dissolve the very corporation they set out the defend, we agree with the trial court's analysis that this inconsistent stance does not rise to such a level as to mandate forfeiture of the attorney's fees awarded. As the trial court states in its "Memorandum and Order" of January 16, 2004:

> Turning to New Elk Brand's other grounds for dismissal–unclean hands and forfeiture–the Court denies that ground. The Court finds that New Elk Brand has not

> demonstrated conduct by the plaintiffs of such a criminal, negligent or offensive nature so as to work a forfeiture or to constitute unclean hands.
>
> The Court grants that the filing of a lawsuit in Kentucky by the derivative plaintiff shareholders to dissolve Old Elk Brand was inimical to Old Elk Brand as a going concern and was inconsistent with the plaintiffs' conduct in this case of pursuing an appeal to defend the jury award and to reverse certain rulings of this Court for remand to recover more money for Old Elk Brand. The inconsistency of these positions, on one hand dissolving the corporation and on the other hand seeking to recover more money for the corporation, could not proceed in tandem. The plaintiffs would have been forced to elect a remedy, either appeal of this case or dissolution. But, this Court concludes that taking an inconsistent position that would then require the plaintiffs to elect a remedy falls short of demonstrating such offensive conduct on the part of the plaintiffs to forfeit their claim for recovery of attorneys' fees which had already accrued.

As the trial court correctly points out, we must also consider the Derivative Plaintiffs' actions in light of Mr. Walter Marianelli's merger of Old Elk Brand into New Elk Brand, which, unlike the Derivative Plaintiffs' dissolution suit, actually culminated in the dissolution of Old Elk Brand. The fact that Mr. W. Marianelli sought the same kind of dissolution and accounting remedy by means of the short-form merger casts the Derivative Plaintiffs' attempt at dissolution in a more favorable light. From the record as a whole, we cannot conclude that the trial court erred in denying forfeiture of the attorney's fees on this ground.

(2) Violation of the Rules of Professional Conduct

Elk next contends that the Nebel Firm and Mr. Nebel forfeited their fee when they violated The Rules of Professional Conduct. Specifically, Elk argues that the Nebel firm represented both the Derivative Plaintiffs and Elk and, in so doing, prejudiced the interests of both in violation of Rule 1.7 and Rule 1.13 of the Rules of Professional Conduct. Rule 1.7(a) provides, in pertinent part, that:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> >
> > (2) Each client consents in writing after consultation.

Elk also points to Comment (7) to Rule 1.13 of the Rules of Professional Conduct, which provides, in relevant part, as follows:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest that the lawyer cannot represent such constituent and that the constituent may wish to obtain independent representation. Care must be taken to assure that the individual understands that, <u>when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual and that discussions between the lawyer for the organization and the individual may not be privileged</u>.
>
> (Emphasis added by New Elk).

Contrary to Elk's position, nothing in the record suggests that the Nebel Firm or Mr. Nebel represented Elk in this litigation. This Court is not persuaded that the fact that Mr. Nebel and his firm pursued the derivative claim that belonged to Elk evinces an attorney-client relationship with the corporation. Rather, the record clearly indicates that Elk retained its own attorney (i.e. Mr. Jon Ross). There is also no indication that either Elk or New Elk Brand ever sought counsel with the Nebel Firm or Mr. Nebel. In fact, throughout the course of this litigation, Elk and New Elk Brand have consistently taken positions contrary to those advocated by the Derivative Plaintiffs, who were, in fact, represented by the Nebel Firm and Mr. Nebel.

(3) Abuse of Discovery Process

There is no dispute on appeal that Mr. Nebel did violate certain discovery orders of the trial court. The gravamen of this issue is whether the trial court's decision to impose $200,000 in sanctions rather than requiring a complete forfeiture of fees constitutes an abuse of discretion. We conclude that it does not. It is well settled in Tennessee that appellate courts review a trial court's decision to impose sanctions and its determination of the appropriate sanction under an abuse of discretion standard. *Lyle v. Exxon Corp*., 746 S.W.2d 694, 699 (Tenn.1988). Trial courts have wide discretion to determine the appropriate sanctions to be imposed for abuses of the discovery process. *Mercer v. Vanderbilt Univ., Inc*., 134 S.W.3d 121 (Tenn.1994). Such discretionary decisions will be set aside on appeal only when the "trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence." *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn.Ct.App.1999) (citing *Overstreet v. Shoney's, Inc.*, 4S.W.3d 694, 709 (Tenn.Ct.App.1999)). Despite Mr. Nebel's shortcomings in timely and accurately answering discovery, the record does not support a finding that Mr. Nebel intentionally sought to deceive, defraud or mislead the trial court. Consequently, we cannot conclude that the trial court abused its discretion in sanctioning Mr. Nebel $200,000 rather than the sum total of his fees.

(4) Employment of Mr. Szarwark

It is undisputed that the Nebel Firm employed Mr. Szarwark, an attorney who served time in the penitentiary for the embezzlement of some $400,000 from his former law firm. Mr.

Szarwark has surrendered his license to practice law and is employed by the Nebel Firm as a law clerk. The record indicates that Mr. Szarwark was not overly involved in this case. There is no proof that he signed pleadings, gave legal advise, or appeared in court on behalf of the Nebel Firm's clients. Lucien Pera, Esq., who is qualified as an expert witness on legal ethics, testified by affidavit that, because Mr. Szarwark resigned from the Florida and Indiana bars rather than being disbarred or suspended, under the *Tennessee Rules of Professional Conduct,* the Nebel Firm violated no ethical rules contained therein in its employment of Mr. Szarwark. Specifically, Mr. Pera testified that the current trend favors attorneys assisting former lawyers in their efforts at rehabilitation, and that this appears to be Mr. Nebel's motivation in hiring Mr. Szarwark. From the record, we cannot conclude otherwise. The record supports he trial court's determination that no intentional ethical violation occurred in the Nebel Firm's employment of Mr. Szarwark or his work on this case.

(5) Mr. Nebel's public censure

It is undisputed in the record that Mr. Nebel was censured for sharing legal fees with a non-lawyer in violation of DR 1-102(A)(1)(5) and DR 3-102(A) of the Code of Professional Responsibility. The fact remains that this censure arose from a case that is not linked to the one at bar. We cannot, as Elk would urge, go so far as to say that an ethical violation in one case supports a finding of an ethical violation in another case. To find so would be strictly conjecture. Consequently, we cannot say that the trial court abused its discretion in declining to mandate a forfeiture of attorney's fees based upon this ground.

J. Reasonableness of the fees awarded

An award of attorney's fees is within the trial court's sound discretion, and we will not overturn its decision absent a clear abuse of discretion. *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn.1995). The 6th Circuit has addressed the factors that should be considered in evaluating the reasonableness of attorney's fees awarded from a common fund:

> This circuit over the years has pointed out the considerations that enter into the fixing of reasonable fees by the court. They include 1) the value of the benefit rendered to the corporation or its stockholders, 2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, 3) whether the services were undertaken on a contingent fee basis, 4) the value of the services on an hourly basis, 5) the complexity of the litigation, and 6) the professional skill and standing of counsel involved on both sides. *Denney v. Phillips & Buttorff Corp.*, 331 F.2d 249 (6th Cir.), cert. denied, 379 U.S. 831, 85 S.Ct. 61, 13 L.Ed.2d 39 (1964); *Pergament v. Kaiser-Frazer Corp.*, 224 F.2d 80 (6th Cir. 1955); *In re Detroit Int'l Bridge Co.,* 111 F.2d 235 (6th Cir. 1940).
>
> *Ramey v. Cincinnati Enquirer, Inc.* 508 F.2d 1188, 1196 (6th Cir. 1974, cert. Denied, 422 U.S. 1048 (1975).

In the instant case, the trial court relied upon affidavits, discovery, and testimony adduced at the evidentiary hearing on attorney's fees. We note that, at this hearing, the defendants were permitted cross examination of the plaintiffs' affiants and were allowed to present proof in opposition to the fee applications. From all of this, the trial court awarded Sherrard & Roe $335,810.00 in attorney's fees and The Nebel Firm $1,967,078.33 in attorney's fees, which was then reduced by $200,000.00 in sanctions imposed by the trial court as discussed above.

(1) Sherrard & Roe's award

The affidavit of William L. Harbison, filed August 29, 2003 indicates that Sherrard & Roe represented the Derivative Plaintiffs in 1993. Initially, their services were rendered under a March 19, 1993 hourly rate engagement letter. After the 1994 dismissal of the case, the Derivative Plaintiffs and Sherrard & Roe entered into a written agreement, in August 1994, that the appeal of the case would be handled on a full contingency fee basis. The fees sought by Sherrard & Roe in the instant case are for services rendered between March 19, 1993 and April 30, 1997. The trial court determined that the award of fees to Sherrard & Roe would be made using the lodestar/multiplier method. Under this method, the court takes into account the reasonable hours expended multiplied by a reasonable hourly rate and the sum is multiplied by a lodestar multiplier. The record shows that the actual hours logged by Sherrard & Roe included 398.55 attorney hours and 26 law clerk hours. These hours were multiplied by a blended hourly rate of $300 per hour for attorneys and $90 per hour for law clerk, which we conclude is justified by the record. The trial court then used a two times multiplier. The trial court then awarded a second component, "fees on fees," which was the actual hour and dollar amount expended by Sherrard & Roe in attorneys fees and expenses (totaling $82,861.03), and awarded another $10,000.00 for time spent on the evidentiary hearing on the fee issue. The $82,861.03 and $10,000 was rounded to $92,000 and added to the first component, totaling $335,810.00.

Given the complexity of this litigation, the sheer number of years it has taken to reach its conclusion, the expertise necessary to navigate the litigation, and the number of documented hours spent by Sherrard & Roe, we find that the record supports the trial court's award of $335,810.00 in attorney's fees.

(2) The Nebel Firm's award

With respect to the Nebel Firm's application for attorney's fees, the trial court was faced with the fact that The Nebel Firm was rather careless in its record keeping (which was the reason for the $200,000 in sanctions). In arriving at the award, the trial court concluded that it was reasonable to award 33 1/3 % of the $6.9 million jury verdict, and then deduct the $335,810.00 Sherrard & Roe award. Given the circumstances of this case, we find that this means of calculation was reasonable.

The Nebel Firm has requested this court to increase the fees awarded, in part, in view of this appeal. That request may be addressed to the trial court on remand.

V. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court entered upon the jury verdict and the trial court's order on attorney's fees. The matter is remanded with costs of this appeal assessed equally against Walter Marianelli and Elk Brand Manufacturing Company.

DONALD P. HARRIS, SENIOR JUDGE